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No. 95-1322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL THOMAS CREHAN AND
SUZANNE TETREAULT CREHAN

Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, *et al.*
and MELLON MORTGAGE COMPANY,

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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On Petition for a Writ of Certiorari to the
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REPLY BRIEF FOR THE PETITIONERS

Petitioners Michael Crehan and Suzanne Crehan seek review of a ruling of the Eighth Circuit, which denied them the right to opt out of a class action settlement. The petition explained that the courts of appeals are in conflict on whether Federal Rule of Civil Procedure 23 and the Due Process Clause require that class members be given the right to opt out and to litigate their money damages claims individually. As discussed in the petition, the due process issue presented here is the same question upon which this Court granted

review in *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994).

In *Ticor*, the Court noted that there was a "substantial possibility" that Rule 23(b)(3) provided class members with "a right to opt out of any class action which asserts monetary claims on their behalf." *Id.* at 1361. Because the Rule 23 issue was not presented in *Ticor*, and a decision requiring an opt out based on the Rule would have obviated the need to reach the constitutional question, the Court dismissed the writ of certiorari as improvidently granted. *Id.* at 1362.

In their briefs in opposition, respondents Gretchen DeBoer and Mellon Mortgage Company do not deny that this case presents an opportunity to consider the Rule 23(b)(3) question and, if necessary, the constitutional question upon which review was granted in *Ticor*. Rather, respondents argue that there is no conflict among the courts of appeals on these questions and that petitioners "waived" their constitutional opt-out rights by filing objections to the class action settlement while also asserting their rights to opt out of it. *E.g.*, DeBoer Opp. 18. In this regard, respondents contend that the only way in which petitioners could have challenged the denial of their rights to opt out under the Due Process Clause was to stay out of the settlement proceedings entirely, and collaterally attack the settlement in another proceeding. But if petitioners took that approach, as *Ticor* teaches, 114 S. Ct. at 1361-62, they could not have raised the Rule 23 issue on collateral review. In short, according to respondents, there was no way for petitioners to preserve their right to litigate both issues, an odd result given that the

writ of certiorari in *Ticor* was dismissed on the ground that only the due process issue was presented. Thus, respondents' approach puts petitioners in a Catch-22 position that this Court should reject. Moreover, as we now show, respondents are in error when they assert that the courts of appeals are not in conflict over the issues presented.

1. Rule 23.

Whether judged by the complaint or the settlement agreement, respondents are simply wrong that the damages aspect of this case was properly certified under Rule 23(b)(2) on a non-opt-out basis. The complaint sought both monetary damages suffered by the class on account of Mellon's unlawful escrow practices and an injunction. Eighth Circuit Joint Appendix ("JA") 193.

Respondents are correct that the damages relief actually awarded in the settlement is meager (about 35 cents per class member), but it is the *preclusion* of the class members' damages claims that is the principal achievement of the settlement agreement. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (1992), *writ dismissed as improvidently granted*, 114 S. Ct. 1359 (1994). Under the settlement, each class member is forever barred from recovering their actual losses, special compensatory damages, and punitive damages based on Mellon's unlawful practices. *See* Settlement Agreement, ¶ 32, JA 244-45. Further, the "injunctive relief" obtained by the class does not *require* Mellon to do anything; rather, it *permits* Mellon to escrow the maximum amount then allowed by federal law (a two-month escrow reserve) and *rewrites* each class members' contract if, as was

the case for petitioners, the escrow reserve permitted by the contract was lower than the statutory maximum. JA 229-32, 237; *see also* Complaint, ¶ 11, JA 188 (terms of some class members' mortgage contracts required escrow reserves to be lower than the statutory maximum).

At the very least, respondents do not deny that this case involves both injunctive relief *and* damages. They assert, however, that, where both forms of relief are present in a class action, it is preferable to certify the class solely under Rule 23(b)(2), which does not provide the class members a right to opt out. It is true that the Eighth Circuit below and other courts of appeals have held that the non-opt-out subdivisions of Rule 23(b) should take precedence over Rule 23(b)(3) whenever both damages and injunctive relief are present. *See* Pet. App. 6a; *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). However, respondents ignore the decisions of other courts of appeals which have taken the opposite position—that, where individual damages claims are present, class members must be accorded Rule 23(b)(3)'s notice and opt-out rights. *See, e.g., In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987); *see also Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1994); *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981); *McDonnell Douglas Corp. v. United States Dist. Court*, 523

F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).*

In this regard, respondents misconstrue petitioners' reliance on cases such as *Penson*, 634 F.2d 989, and *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983). Respondents claim that these cases are inapposite because they involved class certifications under Rule 23(b)(2) in which opt-out rights were provided as a matter of discretion, not of right. But that begs the question. The essential problem here is not which subdivision of Rule 23(b) was chosen by the district court, but whether opt-out rights had to be accorded the class members. As the court in *Penson* put it, when individual monetary relief is sought, the case "begins to resemble a 23(b)(3) action and there has been more concern [there] with protecting the due process rights of the individual class members...." 634 F.2d at 994. Here, substantial monetary damages were at stake and, while it might not have been impermissible for the court to have

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* Indeed, contrary to respondents' protestations that this case is a classic injunctive-relief class action in which Rule 23(b)(3) certification is inappropriate, counsel for respondent DeBoer have sought and obtained class certification under Rule 23(b)(3) in other class actions alleging the identical causes of action, and they have settled those claims for exactly the same kind of relief as in this case, while providing an opt-out right. *See, e.g., Lake v. First Nationwide Bank*, 900 F. Supp. 726, 731 (E.D. Pa. 1995); *Bovey v. Lumbermen's Investment Corp & Temple-Inland Mortgage Corp.*, No. 4-91-766 (D. Minn. Apr. 1, 1993).

styled the class certification as one under Rule 23(b)(2), the court had to permit the class members to opt out to pursue their individual damages claims.

Assuming, therefore, that there was a legitimate injunctive aspect to this settlement that could be said to warrant certification under Rule 23(b)(2), at the least, the damages aspect of the case should have been separately certified under Rule 23(b)(3). *See Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); 1 *Newberg on Class Actions* § 4.14, at 4-51 - 4-52 (3d ed. 1992). The courts of appeals are split on whether such dual certification is permissible. And even if that is not permissible, as noted by this Court in *Ticor*, there is a "substantial possibility" that *all* class actions seeking monetary damages must be certified under Rule 23(b)(3), which is a more than sufficient reason to grant review in this case.

Finally, as noted in the petition (at 15-16), but ignored by respondents, the complaint sought relief on behalf of *former* (as well as current) Mellon customers, Complaint, ¶ 2, JA 186, and the settlement agreement separately provides for their damages relief. JA 234-35. With respect to these class members (including the petitioners here), there is no question of whether the injunctive relief "predominates" over the damages relief or vice versa; their claims are solely for money damages. On that score alone, the Eighth Circuit's ruling is irreconcilable with the decisions of other courts of appeals holding that, under Rule 23, class members must be

accorded the right to opt out with respect to their claims for money damages.

2. Due Process.

Respondents make two arguments in an effort to avoid the due process issue squarely presented by this case. First, they claim that there is no conflict between the denial of petitioners' opt-out rights in this case, Pet. App. 18a, and the decision of the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (1992). In fact, *Brown* stated in no uncertain terms that opt-out rights must be afforded in a class action "if monetary claims are involved," and specifically held that due process requires that class members be permitted to opt out in a "hybrid suit" involving both injunctive and damages claims. *Id.* at 392; *see also id.* (class members must be permitted to opt out where settlement involves "the *foreclosure of substantial damages claims*")(*quoting In re Real Estate & Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989)). More importantly, this Court understood the Ninth Circuit's ruling to say exactly that. *See Ticor*, 114 S. Ct. at 1361; *id.* at 1362 (O'Connor, J., dissenting). In sum, the due process question here is worthy of review, since it is precisely the question upon which this Court granted review in *Ticor*.

Second, taking their cue from the Eighth Circuit, Pet. App. 8a, respondents assert that petitioners "waived" their due process challenge because, in addition to demanding the right to opt out, they alternatively objected to the fairness of the settlement. The petition explains in some detail why

there was no waiver here, not the least of which is that the waiver theory cannot be squared with this Court's due process ruling in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *See* Pet. 18-22. Without repeating that explanation, the fundamental flaw in respondent's analysis warrants a brief discussion.

Respondents' waiver theory is premised on the notion that petitioners submitted themselves to the jurisdiction of the district court in Minnesota and, thus, voluntarily relinquished their due process claim. *See White v National Football League*, 41 F.3d 402, 407-08 (8th Cir.), *cert. denied*, 115 S. Ct. 2569 (1995). But petitioners' due process claim has nothing to do with whether they established minimum contacts with Minnesota. Petitioners maintain that the Due Process Clause gives them (as well as Minnesota residents who are members of the class) a right to opt out of any class action in which substantial damages claims are at issue so that they can litigate those claims on their own. *See Shutts*, 472 U.S. at 812. There was no "waiver" by petitioners when they filed papers objecting to a settlement that abrogated that right.

CONCLUSION

For the foregoing reasons and those set out in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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